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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY RAY OWENS, Defendant and Appellant.	H033225 (Santa Clara County Super. Ct. No. BB726410)

A jury convicted defendant of possessing cocaine base for sale. (Health & Saf. Code § 11351.5.)[1] The same day, the court found true the allegations that defendant had been twice previously convicted of possessing cocaine base for sale, had served two prior prison terms, and had been free on bail when he committed the new offense. (Pen. Code §§ 667.5, subd. (b), 12022.1; § 11370.2.) At sentencing, the court struck one of the prior convictions and both of the prior prison terms, and sentenced defendant to prison for nine years: four years for possession for sale, three years consecutive for the remaining prior conviction, and two years consecutive for the on-bail enhancement. On appeal, defendant contends that his trial attorney rendered ineffective assistance of counsel when he failed to object to the introduction of evidence of his prior convictions for section

[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

11351.5 violations. He also contends that the trial court erred in admitting evidence of defendant's prior convictions. We will affirm.

STATEMENT OF FACTS

On April 4, 2007, at 3:00 a.m., Palo Alto Police Officers Edward Park and Carlos DeSantiago were checking on the welfare of transients who were asleep on benches at the bus depot at 95 University Avenue, an area well known for drug sales. Defendant was lying down on one of the benches with a hood partially covering his head when Officer Park approached him and asked him if he was okay. Officer Park had to ask defendant three times before defendant responded, providing his name and date of birth. Officer Park did a warrant check and learned that defendant had an outstanding traffic warrant, for which Officer Park detained defendant while he issued a notice to appear.

Meanwhile, Officer DeSantiago conducted a consensual search of defendant's person. He found two cells phones in defendant's jacket, and a small brown paper bag containing several individually wrapped pieces of rock cocaine in a "fanny pack" on defendant's waist. He arrested defendant and placed him in the patrol car. Defendant spontaneously stated: "I don't care about the crack. I just want my personal items or belongings." Defendant appeared to be under the influence of crack cocaine.

A further search of the fanny pack yielded another brown paper bag with 20 more pieces of individually plastic-wrapped pieces of cocaine base, some clear plastic baggies, nine dollars in cash, and 13 pieces of paper with the telephone number of one of the cell phones and the initials "TW."[2] All told, defendant was found in possession of 22 individually wrapped rocks of cocaine base with an aggregate weight of 8.2 grams.

Sergeant Russell Barcelona of the Mountain View Police Department testified as an expert in possession of cocaine base for sale. The most common way of assessing

[2] According to defendant, "TW" stands for "Turkwood," a neighborhood in San Francisco, and also defendant's street name.

whether a given amount of cocaine is possessed for personal use or for sale is by the quantity of cocaine possessed and the manner of packaging. If a person is carrying four or more individually wrapped rocks of cocaine, he or she is selling the drugs. If the person is also carrying a cell phone or a pager, that fact also indicates he or she is selling the drugs.

In Sergeant Barcelona's opinion, the fact that defendant was carrying 22 pieces of individually wrapped cocaine, two cell phones and 13 pieces of paper with his initials and cell phone numbers was indicative of possession for sale. He testified: "[Defendant] is definitely in possession for sales. [¶] He's got way more than what would be consistent with personal use. . . . They're all individually packaged which makes them readily available for single sales. And if one of those phone numbers is one of these on these pieces of paper then I would say this is his calling card. This is his business card, so he hands this out and tells you if you want anything, you can call this number and we can make a deal."

Defendant testified in his own behalf. He purchased 25 individually wrapped rocks of cocaine on April 3, 2007, in San Francisco for his own personal use. He got a discounted price of about $200 because it was a "package deal." He got that large an amount because he "wanted to make sure [he] stretched that supply."

That night he received a call from a female he knew from a "party line"[3] and he "rushed out of the house" to meet her in Sunnyvale with 10 pieces of cocaine rolled up in toilet paper in his fanny pack on the left-hand side for his personal use. He forgot he had the other 12 pieces in a little sandwich bag with his marijuana in the back of his fanny pack. He explained that he separated the two quantities of rocks because "I'm not one of the type of smokers, you know, that just like smoking all this stuff, and plus I being in constant contact with people, you know, on the streets because I'm from the City, so I be

[3] Defendant explained that "a party line [is] like a chat line that you get on the telephone or at a pay phone, and you pay, and . . . you talk for about . . . an hour or so."

in constant contact with people, individuals in certain neighborhoods or, you know, wherever I might be traveling at that time." He denied that he was "in constant contact with people" because he was selling drugs. The 10 rocks in the toilet paper were "for my later on . . . use." He planned to use two or three of the 10 rocks himself; and he had "no problem" sharing some of his 10 rocks with people he might be "subject to come in contact with."

Defendant admitted writing his phone number on the 13 pieces of paper found in his fanny pack. He used them "to get a hold of females, or [when] I want to give them my information. . . . I just hand them out. If I'm on the bus or I'm on a Greyhound whatever, I just give it to them." Defendant acknowledged that, as Sergeant Barcelona had testified, the slips of paper with the phone number could be handed out to potential customers wanting to purchase cocaine. Reiterating that he only used the phone for contact with females, defendant testified: "You know, I don't try to incriminate myself because I know . . . like I said I live in San Francisco, and you have to be very careful how you carry yourself in San Francisco." Asked by his attorney what he meant by that, defendant replied: "[A]s you already know I have . . . convictions, you know, in the sales, and, you know, when I was on parole I was on a constant watch in San Francisco by the PD because every time – because of the fact that I came through the county jail a lot. [¶] So basically if I had anything on me, anything whatsoever on me and they know who I am, particularly the residence where I'm staying at, they going to come and search me and do whatever they got to do by any kind of means necessary so I have to make an adjustment in what I do so I wouldn't be disrespecting the residence I was at. So I wouldn't, you know, be getting anything – I wasn't getting an agent to me, you know, to my person because like I said it was kind of like, you know, embarrassing being on parole."

Asked by his attorney if "it was ever your intent to sell any of these rocks of cocaine," defendant replied, "Not that night." Asked about his intent with respect to the

remaining 12 rocks in the front portion of his fanny pack, defendant explained: "I can't say that I wasn't – I can't say that I wouldn't have sold it, sir. I don't want to sit up here and say what I wouldn't have done, but I bought that dope for my own use, for my own use. But I can't sit up here and tell you what I wouldn't have done with it." On cross-examination, defendant admitted that it was his intention to trade some of the rocks for music and marijuana "at the opportune time."

Asked by his attorney why he had two phones, defendant explained that he used the Nokia for calls to and from females, such as the one who called him that night. It was a national phone and could be used for out of state calls. The Metro phone was for California calls only. He used it "for business . . . like getting a hold of lawyers or things of that nature."

Under questioning by his own attorney, defendant admitted that in April of 1987 he was convicted "for a case of possession for sales of cocaine" out of San Francisco, and in 1993 was also convicted "of a case of possession for sale of crack cocaine" out of Sonoma County.[4] He also admitted that he had a prior conviction for petty theft in 1985

[4] Defendant was also cross-examined about his prior drug convictions after he testified that he could not say whether he knew that the number of rocks in his fanny packs was "a quantity sufficient for sales." Immediately thereafter, the court instructed the jury as follows. "[Y]ou have heard evidence that Mr. Owens has been convicted of two felonies and that he committed the other offenses of possession for sale of cocaine base that was not charged in this case. [¶] That evidence is being admitted for two limited purposes with regard to the convictions themselves. All of the convictions that you have heard, the two theft convictions and then the two convictions for possession for sales of cocaine base. The convictions are allowed for purposes for you to determine, to evaluate the credibility of Mr. Owens's testimony with regard to evidence that Mr. Owens committed the other offenses of possession for sale of cocaine base, which are the basis of his two felony convictions. [¶] Do not consider that evidence for any other purpose except for the limited purpose of determining the defendant's intent to sell cocaine base. [¶] So with regard to both the convictions and evidence that he committed other offenses of possession for sale of cocaine base that were not charged in this case, do not conclude from the evidence that the defendant has a bad character or is disposed to commit crime. And do not consider the evidence for any other purpose except for the limited purposes that I have advised you of."

and a conviction for petty theft with a prior theft conviction in 1988, and that both offenses were misdemeanors.

Asked by his attorney to explain to the jury "why they should believe that you were not possessing [22 rocks of cocaine] for purposes of sales back in April of last year," defendant testified: "Members of the jury, the 22 individual rocks of cocaine that I had in my fanny pack was for my personal use. That's why I purchased it. That's exactly why I purchased it. I bought them for myself because I don't have money to smoke all the time. [¶] I'm not a habitual smoker, but that particular day I bought that 25 rocks that I testified earlier about for my own personal use because I wanted to smoke whenever I felt like it, so I purchased those 25 for my own personal use. That's why I bought them for." Defendant also testified that he had "no knowledge where them ten sandwich bags came from" that Officer DeSantiago pulled out of the front pocket of the jacket he was wearing at the train station.

DISCUSSION

I. Ineffective Assistance of Counsel

Defendant contends his trial attorney rendered constitutionally inadequate assistance of counsel by failing to object to the introduction of evidence of defendant's two prior convictions for possession of cocaine for sale to prove that he possessed the 22 rocks of cocaine at issue in his trial with the intent to sell them. He argues that "competent counsel would have objected to Mr. Owens' unintentional slipups and asked for admonitions[;] . . . objected to the court changing its ruling and unsanitizing the prior convictions[;] . . . objected to the admission of prior convictions to prove intent since the prosecutor failed to make the required similarity showing[;] [and] objected to the highly prejudicial evidence, both to ensure a fair trial and to preserve the issues on appeal." We disagree.

A. Procedural Background

Prior to trial, the court memorialized its rulings on the prosecutor's in limine motions. It tentatively ruled that "the People may introduce evidence of prior acts under [Evidence Code section] 1101, subdivision b, on the issue of knowledge should the defense put knowledge at issue, which means the People cannot introduce such evidence in their case in chief." The court also tentatively ruled that if defendant testified, he could be impeached with his 1987 and 1993 prior felony convictions for violating section 11351.5, his 1983 misdemeanor conviction for violating Penal Code section 666, and his 1985 misdemeanor conviction for violating Penal Code section 488. The prosecutor indicated that she would be seeking admission of the fact of the misdemeanor convictions under Evidence Code section 452.5. Defense counsel voiced no objection to either ruling.

During trial, and after a 15 minute conference in chambers, the court revisited its ruling regarding impeachment. Stating that it had "conducted a 352 analysis," the court ruled that, despite their age, the prior convictions were not remote because "Mr. Owens had continuous period of being in custody since his last prior with relatively short breaks in between the period of being in custody." However, the court decided "after doing a 352 analysis" to "sanitize" the prior felony convictions and "allow the People to refer to them as a prior felony conviction only" because the prior convictions were "identical to the one in trial right now." The court also denied without prejudice the prosecutor's supplemental motion in limine to permit use of documentary evidence of defendant's prior section 11351.5 convictions to prove defendant's knowledge and intent to sell in the current case.[5] Defendant was present during the court's recitation of its rulings.

After defendant volunteered on direct examination that he had suffered convictions "in the sales" of drugs, the prosecutor renewed her in limine motions to

[5] The prosecutor's written motion relied on Evidence Code section 452.5, and cases construing that statute.

permit the "unsanitized" use of defendant's prior section 11351.5 convictions for impeachment and to prove knowledge and intent. The court deferred ruling on the renewed motion until the next day to permit the defense to "take some time to think about it."

The following day, the prosecutor limited her motion under section Evidence Code section 1101, subdivision (b) to the issue of intent only. The following colloquy then occurred:

"[DEFENSE COUNSEL]: In light of Mr. Owens's admissions yesterday here in open court under oath, I understand that the Court intends to allow the People to use his two prior 11351.5 prior convictions. . . . [¶] I have reviewed that with Mr. Owens last night in the jail. In other words, I anticipated what would be the Court's ruling, and I believe he understands why, and I do as well.

"[THE COURT]: Thank you. So on that issue basically the cat is out of the bag. Mr. Owens volunteered that he had a conviction for sale and that he was on parole. . . . [T]he Court believes that not only is the cat out of the bag, but also to still sanitizing the prior felony convictions may even be more prejudicial to him because that may leave the jury to wonder whether Mr. Owens was convicted of any other type of felonies or even more serious felonies as well in addition to the sale conviction that he had already referred to. [¶] So the Court . . . would not require the People to sanitize the name of the prior convictions for impeachment purposes. [¶] Now, the next is the 1101(b) issue on intent. Do you have any comment, Mr. [Defense Counsel]?

"[DEFENSE COUNSEL]: Your Honor, no. I think, again, based on Mr. Owens's admissions in open court the only thing that I may again reiterate in terms of trying to prove intent is the age of the prior convictions. [¶] Again, we're talking two incidents, one in 1987, . . . which was 20 years almost exactly prior to the date of the current incident . . . and the subsequent prior was 1993, 15 years ago. And those are the same arguments I made earlier with regard to why they should partially be kept out. [¶] But I

also understand as we reviewed Mr. Owens's record back in chambers that the argument would obviously be stronger if he didn't have a series of VOPs after his release in '93 after he completed his ten-year sentence. So I am – unfortunately aware of that as well. [¶] So I'll submit it on those comments.

"[THE COURT]: Thank you. [¶] On the issue of the use of the uncharged acts, in those two prior convictions for intent under 1101(b), the Court had previously denied the People's motion without prejudice and not only by way of the opening statement, but more importantly by way of Mr. Owens's testimony so for intent – the defense has put intent squarely at issue, and it is the material issue in the case and also the inference of similarity under 1101(b) for intent purposes. The law requires less similarity than for other purposes such as MO; however, in this case, that prong is not at issue because the prior uncharged acts are identical to the current case. [¶] I also find that the probative value is substantial since intent is the material issue, and it's not outweighed by the probability that its admission would create a serious danger of undue prejudice, confusing the issues, or misleading the jury, and particularly in view of Mr. Owens himself having already volunteered that he was convicted for sale. [¶] In terms of remoteness, the Court had previously stated the reason in allowing the priors to be used for impeachment purposes, why the Court felt that the convictions were not remote and that was based on the information in the People's brief, which was not contested, that Mr. Owens had five violations of parole after serving a ten-year sentence for his last conviction in 1993. . . . [¶] . . . [¶] So based on that offer of proof that the frequent periods of violations of probation [*sic*] since his release from prison after serving a ten-year prison term for his 1993 conviction, and the 1993 prior is not remote and likewise with the 1987 possession for sale prior, again, because of his continuous record of criminal activities both before the 1987 conviction and after his 1987 conviction. [¶] And in terms of proving the prior uncharged acts for purposes of showing intent, Mr. [Defense Counsel], my understanding is for purposes of limiting the evidence to avoid any undue prejudice you agree that Ms.

[Prosecutor] may ask the question of your client whether he was . . . arrested on January 29, 1987, at that time whether he was in possession of cocaine base and whether he was in possession of the cocaine base with the intent to sell it and the same types of questions for the 1993 incident and no more than that. [¶] And then finally you will also stipulate that Mr. Owens was convicted of possession for sale . . . and . . . that's for the impeachment part of the People's evidence. So do you stipulate to that?

"[DEFENSE COUNSEL]: "Yes. [¶] . . . [¶]

"[THE COURT]: And this is to avoid the People being able to bring in documentary evidence showing the conviction; is that correct?

"[DEFENSE COUNSEL]: Yes.

"[THE COURT]: And, of course, I will also give a limiting instruction after the 1101(b) evidence is in evidence."[6]

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[6] As noted in the statement of facts, the court did so instruct. It also included the following limiting instructions in its general charge to the jury. "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. [¶] . . . [¶] The specific intent required for the crime of possession for sale of cocaine base is the intent to sell cocaine base. [¶] The People presented evidence that defendant committed other offenses of possession for sale of cocaine base that were not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. [¶] . . . [¶] If the People have not met this burden, you must disregard this evidence and entirely [*sic*]. If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent to sell cocaine base in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense. Do not consider this evidence for any other purpose except for the limited purpose of determining the defendant's intent to sell cocaine base. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. [¶] It is not sufficient by itself to prove that the defendant is guilty of possession for sale of cocaine base as charged in Count 1. The People must still prove each element of the charge beyond a reasonable doubt." (CALCRIM Nos. 303, 375.)

B. General Principles and Standard of Review

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

" 'Tactical errors are generally not deemed reversible; and counsel's decision-making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Under Evidence Code section 1101, prior misconduct evidence is inadmissible if its only relevance is to establish that the defendant possessed a disposition or propensity to commit the charged offense. (*People v. Gibson* (1976) 56 Cal.App.3d 119, 127; Evid. Code, § 1101, subd. (a).) This rule does not apply to prior misconduct that is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. . . .)" (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.) Since substantial prejudice is inherent in admitting evidence of uncharged offenses, such offenses are

admissible " 'only if they have *substantial* probative value.' " (*Ewoldt*, at p. 404.)

"To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. . . . [¶] . . . [¶] A lesser degree of similarity is required to establish relevance on the issue of common design or plan. . . . [¶] The least degree of similarity is required to establish relevance on the issue of intent. [Citation.] For this purpose, the uncharged crimes need only be sufficiently similar [to the charged offenses] to support the inference that the defendant probably harbored the same intent in each instance." (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637, internal quotation marks omitted.) However, a conclusion that other crimes evidence is admissible under section 1101, subdivision (b) does not end the inquiry. Because of its potential for prejudice, to be admissible, such evidence " 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.' " (*Ewoldt, supra,* 7 Cal.4th at p. 404.) " 'The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*Lewis, supra,* 25 Cal.4th at p. 637.)

On appeal, the trial court's ruling under Evidence Code section 1101 is reviewed for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202.)

C. Analysis

To resolve defendant's claim of ineffective assistance of counsel for failing to object to evidence under Evidence Code sections 1101, subdivision (b), we must first determine whether the evidence would have been admissible over objection. If the evidence would have been admissible over the objections defendant proffers on appeal, we need not inquire into counsel's reasons for acting as he did, or determine whether it is reasonably probable that a more favorable result would have occurred had the evidence been excluded. For the reasons we explain below, we need not reach the latter two issues

because we find that the evidence would have been admissible over any objections that defense counsel might have made.

Defendant argues that the evidence of his prior section 11351.5 convictions should have been excluded because it was "highly prejudicial propensity and character evidence." He points out that after conducting an Evidence Code section 352 analysis, the court concluded that the evidence of defendant's identical prior convictions should be "sanitized" to exclude mention of their nature before the jury. He argues: "Just because Mr. Owens had a slip up and volunteered some information about his prior convictions should not have changed the fact that the prior convictions were still highly prejudicial." We disagree.

Defendant's testimony fundamentally changed the Evidence Code section 352 equation. As the trial court noted, the cat was out of the bag: There was no longer any point in trying to keep the nature of defendant's prior convictions from the jury. Moreover, to do so created the risk that the jury would speculate that defendant's unnamed prior convictions were additional to, or more serious than, his admitted convictions "in the sales." Furthermore, by asserting a defense of lack of intent to sell in his testimony, defendant considerably enhanced the probative value of the *nature* of his prior convictions. Intent to sell became more than a latent element of the prosecution's case. It became *the* contested issue in the trial. Under these circumstances, we cannot say the court abused its discretion by reconsidering its prior tentative ruling in light of the new developments in the trial.

Defendant also argues that his trial counsel should have asked the court to admonish the jury to disregard his comments. Again, we disagree. Defense counsel's original strategy was obviously to exclude or limit, as much as possible, evidence of defendant's identical prior convictions. To that end, he evidently argued, prior to trial, that the prior convictions should be excluded because of their antiquity. Although this argument was not wholly successful, defense counsel did manage to persuade the court to

"sanitize" the prior convictions by excluding evidence of their nature. Defendant was aware of the court's rulings on this point because he was present when they were announced. Despite this knowledge, defendant candidly told the jury that he had convictions "in the sales," was on parole, and was "on constant watch" by the San Francisco police because he was in and out of county jail "a lot." And, he said he did not have the intent to sell cocaine "that night." The apparent thrust of defendant's testimony was to minimize the effect of his prior convictions on his credibility by forthrightly contrasting his past – and possibly future – actions, with his actions in the case for which he was on trial, in an effort to convince the jury that, on *this* occasion, he possessed cocaine for his personal use only.

This strategy may have been at odds with defense counsel's original strategy, but the record contains no basis for concluding that the trial counsel lacked a tactical reason for declining to ask for an admonition. After the testimony, the prosecutor's renewal of her in limine motion, and the trial court's decision to defer ruling until the next day to give defense counsel a chance to think about his response, defense counsel spoke with defendant at the jail. Thus, defendant and his counsel had ample opportunity to re-strategize the defense. In our view, defense counsel cannot be faulted for subsequently aligning his strategy with his client's, rather than undermining his client's strategy with a judicial admonition to ignore it.

Finally, defendant also argues that the *fact* of the prior convictions for possession sale of cocaine did not show sufficient similarity to the charged offense to warrant an inference of intent. He argues: "[T]he court had no clue regarding the facts of the prior cases. Thus, there was no factual basis for the court's finding of similarity." We see the matter differently.

In order to be admissible to prove intent, the prior offense and the charged offense must be similar enough to permit an inference " ' "that if a person acts similarly in similar situations, he [or she] probably harbors the same intent in each instance"

[citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.' " (*People v. Rowland* (1992) 4 Cal.4th 238, 261.)

" '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' " (*Ewoldt, supra,* 7 Cal.4th at p. 402.) Prior cases establish that evidence of prior drug offenses is admissible under Evidence Code section 1101, subdivision (b) to prove intent to sell. (*People v. Ellers* (1980) 108 Cal.App.3d 943, 953 [evidence of prior sales of heroin admissible to show intent to sell heroin]; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [since defendant's intent to sell were at issue, evidence of the defendant's prior narcotic offenses was "clearly admissible" to show the defendant's intent].)

Contrary to defendant's assertion, the appellate record does not demonstrate that the court was ignorant of the circumstances underlying defendant's prior convictions. The record indicates that the court and counsel reviewed defendant's prior criminal history in chambers on at least three occasions: prior to ruling on the prosecutor's in limine motions, during trial when the court revisited its ruling on impeachment, and prior to the colloquy in open court with counsel the day following defendant's testimony. On the record, the court made the finding that the current offense and the prior offenses were *identical*. The record also shows that defense counsel made a tactical decision "for purposes of limiting the evidence to avoid any undue prejudice" to agree that the prosecutor could ask defendant only "whether he was . . . arrested on January 29, 1987, at that time whether he was in possession of cocaine base and whether he was in possession of the cocaine base with the intent to sell it and the same types of questions for the 1993

incident and no more than that." This suggests that the court and both counsel were aware of the circumstances underlying defendant's convictions. On this record, we find no basis for concluding that the court was clueless of the factual circumstances underlying the convictions, or the prosecutor remiss in failing to lay a sufficient foundation for a finding of similarity in chambers, or defense counsel incompetent for failing to object to the prosecutor's showing.

Furthermore, proof of the prior convictions was sufficient to establish that defendant had, on two prior occasions, possessed exactly the same drug (base cocaine) with the intent to sell it. Evidence Code section 452.5 "states a new hearsay exception for certified official records of conviction, which may be offered to prove not only the fact of a conviction, but the commission of the underlying offense." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1461; accord, *People v. Wesson* (2006) 138 Cal.App.4th 959, 968.) Here, in order to minimize the potential for prejudice to defendant from introduction of the certified official records of conviction at trial, the parties stipulated that defendant's admissions could be substituted for the documentary evidence. Nevertheless, in this case, the principle was the same: evidence of defendant's prior convictions remained admissible to prove the commission of the underlying offenses. In our view, the fact that defendant, on two occasions, possessed base cocaine with the intent to sell it was sufficient to permit the jury to infer that a person who acts similarly in similar situations probably harbors the same intent in each instance.

In sum, even if defense counsel had made the objections defendant proposes on appeal, the trial court would not have abused its discretion in overruling them and admitting the evidence of defendant's prior convictions for violations of section 11351.5. Thus, no ineffective assistance of counsel has been demonstrated.

II. Remoteness of Prior Convictions

Defendant renews the argument he made in the trial court that his prior section 11351.5 convictions should have been excluded because they were too remote to be relevant. He argues that the prosecutor made "no showing whatsoever" that the prior convictions were "in any way related to an intent to sell drugs." Therefore, there was nothing to balance out the remoteness of the prior offenses, or the prejudice from the identical nature of the prior convictions, "and the trial court abused its discretion in admitting those prior convictions." We disagree.

" 'The principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of' the fact for which it is being admitted. . . . [Citation.] Other factors affecting the probative value include the extent to which the source of the evidence is independent of the evidence of the charged offense, the amount of time between the uncharged acts and the charged offense and whether the evidence is 'merely cumulative regarding an issue that was not reasonably subject to dispute.' [Citations.] The primary factors affecting the prejudicial effect of uncharged acts are whether the uncharged acts resulted in criminal convictions, thus minimizing the risk the jury would be motivated to punish the defendant for the uncharged offense, and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses." (*People v. Walker* (2006) 139 Cal.App.4th 782, 806, citing *Ewoldt, supra*, 7 Cal.4th at pp. 404-406; *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

As discussed above, in our view the prior convictions for identical prior crimes were sufficient to permit an inference supportive of intent to sell and therefore did not constitute propensity or bad character evidence. And, the court instructed the jury not to draw any inference that defendant had a disposition to commit crime. The court reasoned that despite their ages, the prior convictions were not remote because of defendant's

numerous parole violations between periods of lengthy incarceration. In addition, we note that the source of the evidence is independent of the evidence of the charged offense, the evidence was not merely cumulative, the fact that defendant was convicted of the prior offenses minimized the risk that the jury would want to punish the defendant for the uncharged offenses, and the evidence of uncharged prior offenses was neither stronger nor more inflammatory than the evidence of the charged offenses. On this record, the court did not abuse its discretion in admitting the evidence of defendant's prior convictions. Since we find no error, we do not address defendant's claim that any error was of federal constitutional magnitude.

CONCLUSION

Defense counsel did not render ineffective assistance of counsel by failing to object to the admission of evidence of defendant's prior convictions for violations of section 11351.5. The trial court did not abuse its discretion in admitting the evidence.

DISPOSITION

The judgment is affirmed.

_____
McAdams, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
Duffy, J.